



School of International Arbitration

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International Arbitration Case Law

School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date:

EDF International SA, SAUR International S.A. and Leon Participaciones Argentinas S.A. v. Argentine Republic (ICSID Case No. ARB/23/03) –Annulment Proceeding

Case Report by:

Ilektra Athanasiou-Ioannou **, editor Julia A. Garza ***

Summary:

In a Decision on Annulment issued on 5 February 2016, an International Centre for Settlement of Investment Disputes (“ICSID”) *Ad Hoc* Committee (“Committee”) unanimously rejected the Argentine Republic’s (“Argentina”) application for annulment of the Award rendered on 11 June 2012 under the Agreement for the Promotion and Reciprocal Protection of Investments between the Government of the French Republic and the Argentine Republic (“Argentina-France BIT”) by an ICSID Tribunal. The Committee found that none of the grounds for annulment of Article 52 of the ICSID Convention invoked by Argentina had been met, namely that (1) the Tribunal was not properly constituted, (2) the Tribunal manifestly exceeded its powers, (3) there was a serious departure from a fundamental rule of procedure, and (4) the award failed to state the reasons upon which it was based.

Main Issues:

Annulment proceeding under the ICSID Convention; improper constitution of the tribunal; manifest excess of powers; serious departure from a fundamental rule of procedure; failure to state reasons; challenges to arbitrators for lack of impartiality and independence; relationship with grounds for annulment; narrow scope of grounds for annulment, role of an *Ad Hoc* Committee.

***Ad Hoc* Committee:**

Sir Christopher Greenwood, CMG, QC (President) - Professor Teresa Cheng, SC - Professor Yasuhei Taniguchi.

Claimant's Counsel: Procuración del Tesoro de la Nación, Buenos Aires, Argentina; Dr. Angelina Abbona (until 16 December 2015), and Dr. Carlos Francisco Balbín.

Respondent's Counsel: Mr. Paolo Di Rosa (Arnold & Porter LLP, Washington, DC, U.S.A.) and Mr. Michael R. Rattagan, Mr. Ricardo Barreiro Deymonnaz (Rattagan, Macchiavello, Arocena & Peña Robirosa Abogados, Buenos Aires, Argentina).

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Digest:

1. Facts of the Case and Procedural Background

During the late 1990s, the Argentine Province of Mendoza restructured the framework for the distribution of electricity, and privatized the State-owned electricity distributor. The company Empresa Distribuidora de Energía de Mendoza S.A. ("EDEMSA") was created and the Province of Mendoza sought to sell 51% of the shares of the company to foreign investors. A consortium company, SODEMSA, incorporated in Argentina, was formed by EDF International S.A. ("EDFI"), SAUR International S.A. ("SAURI"), and Crédit Lyonnais together with Argentine co-investors. EDFI acquired a 45% interest in SODEMSA and SAURI a 15% interest. The remaining 40% interest was acquired by MENDINVERT, an Argentine company, in which Crédit Lyonnais held 70% of the shares, the remainder being held by Argentine investors. Crédit Lyonnais later transferred its interest in MENDINVERT to Leon Participaciones Argentinas S.A. ("Leon"), a Luxembourg corporation wholly owned by Crédit Lyonnais until 2004 when it became a wholly-owned subsidiary of EDFI. SODEMSA successfully bid for 51% of the shares in EDEMSA and in July 1998 EDEMSA and the Government of Mendoza concluded an agreement (the "Concession Agreement"). The terms of the Concession Agreement included fixed tariffs with a provision for both ordinary and extraordinary reviews, established that the costs and rate of return would be

determined in US dollars and that customers would then be invoiced in pesos. At the time, the Convertibility Law in Argentina provided that the Argentine peso was convertible at the rate of one peso to one US dollar (¶¶ 18, 19).

In late 2001 and early 2002, Argentina experienced an acute economic emergency. A National Emergency Law was enacted in January 2002 which abrogated the fixed parity between the peso and the US dollar and allowed the peso to float on the exchange markets; it also abrogated tariff terms in public utility concessions involving foreign currencies, including the relevant clauses in the Concession Agreement. The emergency measures made provision for renegotiation of contracts. EDEMSA entered into negotiations with the authorities in Mendoza but no revision of the tariff was agreed until 7 April 2005, one week after the companies had sold their interests in SODEMSA to an Argentine company, IADESA, owned by Argentine investors (¶¶ 20, 21).

On 16 June 2003, EDFI and SAURI filed a request for arbitration. That request was subsequently amended to add Leon as a Claimant (the “Claimants”). They argued that Argentina had violated the Argentina-France BIT, contending that the measures before and during the crisis were arbitrary and discriminatory, constituted unfair and inequitable treatment, violated the full protection and security requirement, and amounted to indirect expropriation. They also argued that the failure to respect the Concession Agreement breached the most favored nation (“MFN”) clause of the Argentina-France BIT because other BITs signed by Argentina contained umbrella clauses. Argentina argued mainly that Claimants lacked standing to bring the claims because they had sold their interests in EDEMSA to IADESA and that their claim with respect to alleged damage to EDEMSA was indirect or derivative. With regard to the merits, Argentina maintained that the emergency measures were necessary and legitimate responses to an acute economic emergency (¶¶ 22-24).

The ICSID Tribunal handed down a decision on jurisdiction dismissing Argentina’s objections to jurisdiction (¶¶ 25-28). Furthermore, the Tribunal rendered an Award holding that Argentina had breached its obligation to afford Claimants fair and equitable treatment, as well as specific commitments regarding the Concession Agreement, as the MFN clause contained in the Argentina-France BIT that allowed Claimants to rely on the umbrella clause in other BITs concluded by Argentina. It also held that Argentina had failed to meet the necessity requirements under customary international law. Claimants were awarded US \$136,138,430 for damages as of December 2001 compounded annually until payment (¶¶ 29-42).

On October 9, 2012 Argentina filed an application for the annulment of the Award, including a request for the stay of enforcement of the Award under Article 52(5) of the ICSID Convention and ICSID Arbitration Rule 54(1). On January 2, 2013 the Committee was deemed constituted and requested Argentina to submit an unequivocal declaration that it

would pay if the Award was not annulled or only partially annulled (¶¶ 1-9). When Argentina refused to do so, the Committee lifted the stay on September 26, 2013. Claimants filed their Counter-Memorial on Annulment on September 16, 2013; Argentina filed its Reply on Annulment on December 6, 2013, and Claimants their Rejoinder on Annulment on February 25, 2014 (¶ 10). The hearing was held at the seat of ICSID from June 2 to June 3, 2014 (¶ 11). On August 6, 2015 Argentina filed a proposal for the disqualification of Professor Cheng in light of a disclosure made by him in the Total case¹. The Committee rejected on November 20, 2015 Argentina's proposal for disqualification of Professor Cheng, and declared the proceeding closed pursuant to ICSID Arbitration Rule 38(1) on December 22, 2015.

2. Analysis of Legal Issues by the Committee

Argentina challenged the Award on all the grounds provided for in Article 52(1) of the ICSID Convention, except for that of corruption on the part of a member of the Tribunal, making reference to the following six issues; (i) challenges to two members of the Tribunal, namely Professors Kaufmann-Kohler and Remón; (2) the law applied by the Tribunal; (3) the Tribunal's decision on the Claimants' derivative rights and their reliance on the umbrella clause in other BITs; (4) the Tribunal's treatment of Argentina's necessity defense; (5) The Tribunal's alleged failure to decide on fundamental evidence regarding EDFI's investment strategy and the privatization of electricity distribution in Mendoza; and (6) The Tribunal's assessment of damages (¶¶ 43-60).

The Committee first addressed the grounds listed in Article 52 of the ICISD Convention and held those grounds are limited. It also mentioned how it is well established in arbitration case law that the annulment proceeding is not to be considered an appeal or a retrial, but rather a narrow form of review. The Committed also pointed out that the decision to annul is discretionary, even if one or more grounds for annulment are established, and that the burden of proof is upon the party seeking the annulment (¶¶ 61-73). Further, the Committee reiterated after dismissing each of Argentina's arguments that in order to find a failure to state reasons, a Committee should find that the Award did not deal with every question submitted to the Tribunal and that did not state the reasons upon which it is based (Article 48(3)² of the ICSID Convention); but that a Tribunal is not required to deal explicitly with every detail of every argument, or every authority relied upon by the parties. The Committee examined Argentina's six main arguments as follows:

¹ *Total S.A. v. Argentine Republic* (ICSID Case No. ARB/04/1).

² The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.

2.1 Analysis of Argentina's First Argument: Challenges to two members of the Tribunal as grounds for annulment under 52(1)(a) and 52(1)(d) of the ICSID Convention

Argentina asserted that due to the existence of conflict of interests of two members of the Tribunal, namely Professors Kaufmann-Kohler and Remón, the Tribunal had not been properly constituted (Article 52(1)(a) of the ICSID Convention) because two of its members did not meet the requirements of Article 14(1)³ of the ICSID Convention concerning independence and impartiality, and that such a failure in turn constituted a serious departure from a fundamental rule of procedure affecting due process and a party's right of defense (Article 52(1)(d) of the ICSID Convention) (¶¶ 74, 86).

During the conduct of arbitration in 2007, Argentina had applied for the disqualification of arbitrator Kaufmann-Kohler due to her appointment as non-executive director of UBS Bank which had interests in EDF (¶¶ 76-78); the co-arbitrators of Professor Kaufmann-Kohler rejected the challenge (¶¶ 81-82). During the annulment proceeding, Argentina argued arbitrator Remón was biased because he had disclosed in April 2012 that the law firm Uría Menéndez in which he was a partner had previously represented Spanish oil company Repsol, and might be called upon to represent it again against Argentina over Repsol's interests in oil and gas operator YPF. The disclosure occurred after an announcement by Argentina of its intention to expropriate Repsol's interests in YPF, which took place after the closure of the proceedings but two months before the Award was rendered; therefore Argentina could not bring an application for disqualification under Article 57 of the ICSID Convention (¶¶ 83-85).

The Committee first analyzed the applicable legal framework, namely: (i) Article 14(1) of the ICSID Convention setting out the qualifications required for ICSID arbitrators, and (ii) the machinery for the challenge of arbitrators of Articles 57⁴ and 58⁵ of the ICSID Convention. The Committee concluded that "manifest" lack of the required qualities equals an "evident" or "obvious" lack; and, with regard to the test applied, proof of actual bias is not required but rather is an objective test based on whether an independent third party would find an appearance of bias based on a reasonable evaluation of the evidence (¶¶ 107-116, 134).

³ Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment...

⁴ A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

⁵ The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision...

The Committee then analyzed its role in the annulment with respect to arbitrator challenges: where a challenge had already been rejected by the Tribunal and where no such challenge had been brought. As for the first scenario, the Committee held that a reasonable doubt of lack of the requirements of Article 14(1) could constitute grounds of annulment under Article 52(1)(a) and (d), when such lack could be considered to have tainted the subsequent Award (¶¶ 123-128). The Committee also held that when a decision had already been made by the Tribunal, the Committee should not examine *de novo* but should limit itself to the findings of facts by the Tribunal (¶¶ 137-139). The Committee may not find that a ground for annulment exists unless the decision not to disqualify the arbitrator was plainly unreasonable (¶ 145). Finally, the Committee disagreed with the approach taken by the *Azurix* Committee⁶ which held that the role of a committee was limited to examining whether there had been a serious departure from a fundamental rule of procedure in making a decision on the challenge (¶¶ 141). Regarding the second scenario, the Committee considered that its role was to first examine whether the right to challenge an arbitrator had been waived under ICSID Rule 27⁷ (¶¶ 115, 130-131). If it had not been waived then a committee would rule *de novo* on the facts and the law, with the burden of proof being borne on the party seeking annulment (¶ 132). Also, the Committee held the party seeking annulment need not prove that impartiality had a material effect on the Award but only that it could have had it (¶ 134).

Applying those principles to Professor Kaufmann-Kohler, the Committee rejected Argentina's arguments, as it found that the Tribunal's decision on disqualification had been reasonable (mainly due to the relative insignificance of UBS's stake in EDF and the indirect relationship of the Professor with the management of UBS's investments), that it had applied the right standard and both parties had been heard (¶¶ 147-164). Also applying the aforementioned principles to the disqualification of Professor Remón, the Committee rejected Argentina's arguments mainly because the Award had already been drafted at the time of Argentina's announcement, maintaining that it was speculative to hold that Professor Remón knew of the Repsol dispute at the time of the drafting of the Award (¶¶ 165-175).

2.2 Analysis of Argentina's Second Argument: Applicable law issues as grounds for annulment under 52(1)(b), 52(1)(d), 52(1)(e) of the ICSID Convention

Argentina argued that the Tribunal had failed to apply the applicable law and thus the Tribunal manifestly exceeded its powers (Article 52(1)(b) of the ICSID Convention), failed to state the reasons on which the Award is based (Article 52(1)(e) of the ICSID Convention); and as a result, the Tribunal had seriously departed from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention) (¶¶ 50, 176). According to Argentina, the failure to apply the applicable law relates to three aspects of the Award: (i) the Tribunal's decision to

⁶ *Azurix, Corp. v. Argentine Republic* (ICSID Case No ARB/01/12)

⁷ A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.

apply solely the Argentina-France BIT, excluding the Argentina-Luxembourg BIT (with respect to Leon's claims), (ii) the Tribunal's underestimation of Argentine law with regard to the Claimants' rights, and (iii) the Tribunal's failure to recognize a general discrimination requirement as a basis for liability under the Argentina-France BIT(¶ 177).

The Committee held that a failure to apply the applicable law could constitute an excess of powers; it also held that such excess should be "manifest" - or readily apparent. The question would be whether the opinion of the Tribunal is so untenable that it cannot be supported by reasonable arguments (¶¶ 191-193). Based on this principle, the Committee rejected Argentina's argument for manifest excess of powers (¶¶ 214, 220, 226).

The Committee, holding that a Tribunal is not under the obligation to address explicitly every detail or every argument submitted by the parties, concluded that the Tribunal's Award did not suffer from insufficient reasoning – a notion different from unconvincing reasoning which could not establish a ground for annulment (¶ 195). The Tribunal had met the requirement of providing the factual and legal premises that led to its decision, and consequently, there had been no failure to state reasons (¶¶ 196-197, 215-216, 221, 226).

Lastly, the Committee did not find a real argument or evidence advanced by Argentina on how an abuse of process could have occurred in order to establish a serious departure from a fundamental rule of procedure (¶¶ 217, 222, 226).

2.3 Analysis of Argentina's Third Argument: derivative rights and the Tribunal's reliance on the umbrella clause in BITs other than the Argentina-France BIT via the MFN clause of the Argentina-France BIT as grounds for annulment under 52(1)(b), 52(1)(d) and 52(1)(e) of the ICSID Convention

Argentina argued that the Tribunal manifestly exceeded its powers (article 52(1)(b) of the ICSID Convention), failed to state reasons (Article 52(1)(e) of the ICSID Convention) and seriously departed from a fundamental rule of procedure (Article 52(1)(d) of the ICSID Convention) with regard to: (i) the treatment of Claimants' assertion of derivative rights, (ii) the incorrect application of the umbrella clause of BITs signed by Argentina via the MFN clause in the Argentina-France BIT (¶ 228), and (iii) the non-application of the Concession Agreement's privity of contract (¶ 53, 240, 241).

The Committee held that the Tribunal has neither exceeded its powers nor failed to state reasons in its findings as to the MFN clause of the Argentina-France BIT, which was broad enough to embrace the umbrella provisions (¶¶ 237-239), or in its decision regarding Claimants' rights under the Argentina-France BIT independently of the privity of contract of the Concession Agreement (¶¶ 248, 259-261, 276-279). Furthermore, the Committee held that a Tribunal is not required to address in the Award's reasoning every authority or every

argument submitted by the parties (¶ 278) and that the fact that different conclusions may be reached on the same facts does not warrant annulment (¶ 279). Lastly, the Committee dismissed Argentina's argument regarding a serious departure from a fundamental rule of procedure, because neither particulars nor supporting arguments were provided on this point (¶ 233).

2.4 Analysis of Argentina's Fourth Argument: The Tribunal's alleged mistreatment of Argentina's necessity defense as ground for annulment under 52(1)(b), 52(1)(d), and 52(1)(e) of the ICSID Convention

Argentina argued that the Tribunal had failed to apply Article 5(3) of the Argentina-France BIT regarding treatment in case of national emergency (¶ 283), had distorted several of Argentina's arguments (¶¶ 286, 289), and had wrongly applied the necessity standard (¶ 290); and that in so doing, the Tribunal had failed to state reasons, had committed an excess of powers by not applying the proper law and had thus seriously departed from a fundamental rule of procedure (¶ 292).

The Committee held that the Tribunal had applied and analyzed the relevant BIT provisions and the customary law of necessity, and had given reasons for its decision (¶¶ 307-314, 318-327). Thus, there could be no finding of a failure to state reasons (¶¶ 315, 336) or a serious departure from a fundamental rule of procedure (¶¶ 316, 337). Further, the fact that the Tribunal's reasoning was "concise" on some points could not amount to a failure to apply the law and thus a manifest excess of powers (¶¶ 329, 332).

2.5 Analysis of Argentina's Fifth Argument: The Tribunal's failure to decide on evidence submitted by Argentina as ground for annulment under 52(1)(b), 52(1)(e) and 52(1)(d) of the ICSID Convention

According to Argentina, the Tribunal failed to consider fundamental evidence relating to EDF's and EDFI's investment strategy and the convertibility between the Argentine peso and the United States dollar regarding the currency clause in the Concession Agreement, and that in so doing, it had manifestly exceeded its powers, departed from a fundamental rule of procedure and failed to state reasons (¶ 338).

The Committee recognized that failure by a Tribunal to decide on one or more questions submitted by the parties could constitute manifest excess of powers -although it noted that in such instances the principal remedy would appear to be an application for a supplementary decision under Article 49 of the ICSID Convention (¶ 345). However, a Tribunal is not required to rule on each argument or point of fact submitted by the parties (¶ 346), or every piece of evidence (¶ 347). Furthermore, the requirement to state reasons is limited in scope

and, so long as a reader can follow the Tribunal's reasoning, the fact that the Tribunal did not deal with each item of evidence being immaterial (¶ 349).

The Committee found that the Tribunal had complied with its duty to decide on the questions raised by the parties regarding EDF's investment strategy and the currency clause in the Concession Agreement, and had thus not exceeded its powers (¶¶ 347, 348). The Tribunal had stated the reasons for its decision and that reasoning could be followed; thus, there had not been a failure to state reasons (¶349). Lastly, there had not been a serious departure from a fundamental rule of procedure because both parties had presented their case (¶350).

2.6 Analysis of Argentina's Sixth Argument: The Tribunal's alleged failure to assess Argentina's challenges regarding Claimants' calculation of damages as ground for annulment under 52(1)(b), 52(1)(e), and 52(1)(d) of the ICSID Convention

Argentina argued that the Tribunal had failed to take into consideration the challenges it had brought as to Claimants' methodology for the calculation of damages, and that in doing so, it had manifestly exceeded its powers, had seriously departed from a fundamental rule of procedure, and had failed to state reasons (Articles 52 (1)(b),(d) and (e) respectively of the ICSID Convention) (¶ 352).

The Committee, reiterating the limits of the annulment proceeding, held that it could not review *de novo* the facts, evidence, and criteria used by the Tribunal (¶ 367). Criticisms or disagreements as to the application of the law or the selected methodology and computation of damages, even if well-founded, could not lead to annulment (¶ 368). The Committee found that the Tribunal did apply the law and provided reasoning as to the methodology chosen and the calculation of damages (¶¶ 374-386). Thus, the Committee rejected Argentina's arguments (¶ 387).

3. Costs

The Committee directed Argentina to bear the expenses of the proceedings and directed each party to bear its own legal costs, finding that Argentina's case had been "advanced in good faith" and that its arguments were "generally plausible" (¶¶ 389-390).

4. Decision

In a unanimous decision, the Committee dismissed Argentina's application for annulment under Articles 52(1)(a), 52(1)(b), 52(1)(d), and 52(1)(e) of the ICSID Convention in their entirety.